86-888

NO. _____

Supreme Court, U.S.
FILED
DEC 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

IN THE MATTER OF

DAVID M. FRANKLIN, *Petitioner*

A MEMBER OF THE BAR OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

JAMES W. COBB
1004 Sixth Street, N.W.
Washington, D.C. 20001
(202) 387-1100
Counsel for Petitioner

December, 1986

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QUESTIONS PRESENTED FOR REVIEW

I. Whether it was a violation of petitioner's Sixth Amendment right to have been disbarred from the practice of law without being afforded an opportunity to cross-examine the complaining witness.

II. Whether it was a violation of petitioner's rights to due process under the Fourteenth Amendment by not being afforded the opportunity to cross-examine a complaining witness during a disciplinary proceeding.

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Petitioner respectfully prays that a writ of certiorari issue to review the decision of the District of Columbia Court of Appeals of September 3, 1986, declining to review the federal constitutional issues that Petition for Certiorari presents.

OPINIONS BELOW

The District of Columbia Court of Appeals denied petitioner's Petitions for Rehearing and for Rehearing En Banc of the decision of the District of Columbia Court of Appeals, Board on Professional Responsibility which affirmed the Report and Recommendation of Hearing Committee Number Five that petitioner be disbarred from the practice of law in the District of Columbia. The District of Columbia Court of Appeals' denial of Rehearing and for Rehearing En Banc is attached as appendix L.

JURISDICTION

The District of Columbia Court of Appeals' denial of Petitioner's Petitions for Rehearing and for Rehearing En Banc was issued September 3, 1986. This Court has jurisdiction under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part, as follows: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

The Fourteenth Amendment to the United States Constitution provides, in relevant part, as follows: ". . . nor shall any state deprive any person of . . . property without due process of law . . ."

The District of Columbia Bar Rule XI, §7(2) pertaining to Disciplinary Procedure provides, in relevant part, as follows:

> "If there are any issues of fact raised by the pleadings, or if the respondent requests the opportunity to be heard in mitigation, the hearing committee shall serve a notice of hearing. . . . The notice of hearing shall advise the respondent that he is entitled . . . to cross-examine witnesses. . . ."

The District of Columbia Administrative Procedure Rule on Contested Cases provides, in relevant part, as follows:

> "... In contested cases, except as may otherwise be provided by law, other than this subchapter, the proponent of a rule or order shall have the burden of proof. Any oral and any documentary evidence may be received. . . . Every party shall have the right to present in person or by counsel his case or devense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. . . ."

D.C. Code Section 1-1509(b)(1981).

STATEMENT OF THE CASE

Petitioner is an attorney admitted to the District of Columbia Bar. On April 8, 1983, a client filed a formal complaint against him to the Office of Bar Counsel, the Board of Professional Responsibility, District of Columbia Court of Appeals (Appendix A). On September 26, 1983, petitioner responded to the complaint (Appendix B).

On November 8, 1984, Bar Counsel filed a petition against petitioner instituting formal disciplinary proceedings. Petitioner was charged with violating Disciplinary Rule 9-103(A), Disciplinary Rules 1-102(A)(3) and (4), Disciplinary Rule 9-103(B), and Disciplinary Rule 6-1-1(A)(3).

On January 3, 1985, a hearing was held before Hearing Committee Number Five. Petitioner was not present at the hearing, but was represented by counsel. Bar counsel did not call any witnesses, but relied on documentary evidence to prove his case.

On June 26, 1985, the Hearing Committee filed its report with the Board on Professional Responsibility (Board). In its report to the Board, the Hearing Committee found that

petitioner violated Disciplinary Rule 9-103(A), Disciplinary Rule 1-102(A)(4), and Disciplinary Rule 6-101(A)(3) of the Code of Professional Responsibility.

On July 15, 1985, petitioner filed an exception to the Hearing Committee's report on the ground that petitioner's right to due process was violated because Bar Counsel had not presented the complaining witness in support of the complaint lodged against petitioner. Consequently, petitioner was never able to to confront his accused. As a result of said exception, the Board established a briefing schedule and set oral arguments for September 26, 1985.

On November 4, 1985, the Board filed its Report and Recommendation with the District of Columbia Court of Appeals. The Board adopted the findings of fact of the Hearing Committee and adopted the Hearing Committee's recommendation that petitioner be disbarred. Subsequently, on November 25, 1985, petitioner filed the same exception to the Board's report as was filed on July 15, 1985 against the Hearing Committee's report and recommendations (Appendix C). As a result of the exception having been filed, the District of Columbia Court of Appeals, on December 5, 1985, ordered that both petitioner and Bar Counsel file briefs in response to the Constitutional issues raised in the exception made on November 25, 1985 (Appendix D).

Petitioner filed his brief on January 9, 1986, addressing the Constitutional issues raised below (Appendix E). Bar Counsel filed his Brief on February 10, 1986, (Appendix F). On April 30, 1986, the Court issued an order upholding the Board's decision without expressly passing upon the Constitutional issue (Appendix G). Petitioner then filed a petition for a rehearing (Appendix H) and a petition for a rehearing en banc (Appendix I). On July 15, 1986, the District of Columbia Court of Appeals ordered Bar Counsel to file a response to the petition, which Bar

Counsel filed on August 4, 1986 (Appendix J). Petitioner subsequently filed a supplemental memorandum on August 25, 1986, addressing the Constitutional issues (Appendix K). On September 3, 1986, the District of Columbia Court of Appeals' merits division denied petitioner's petition for rehearing or rehearing en banc without expressly addressing the Constitutional issues involved (Appendix L).

Federal Question Raised

Petitioner raised the first federal question in this case by charging that his right to due process under the Fourteenth Amendment had been violated because his right to cross-examine the complaining witness, as set forth in D.C. Code § 1-1509(b), had been denied him.

Petitioner then raised the second federal question in this case by asserting that a disbarment proceeding is quasi-criminal in nature, as established in *Matter of Williams*, 464 A.2d 115 (D.C. App. 1983). Under such circumstances, the Sixth Amendment of the U.S. Constitution entitles petitioner to confront the complaining witness, which he was never afforded the opportunity to do.

The District of Columbia Court of Appeals did not expressly pass upon the constitutional issues, though of course it could not have affirmed the decision below without resolving the constitutional questions against the petitioner. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930).

REASON FOR GRANTING THE WRIT

The District of Columbia Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

Petitioner argues that he was denied his Sixth Amendment right of confrontation because the complainant was not called by Bar Counsel as a witness at the evidentiary hearing. As a result, petitioner has not been allowed the opportunity to cross-examine Bar Counsel's missing witness. Bar Counsel relied only on documents and letters to support his case. Bar Counsel's missing witness was not subpoenaed or required to testify. This is especially significant in light of the fact that petitioner's affidavit and exhibits disputed the complaining witness' affidavit. This fact emphasizes the need for confrontation and cross-examination in this matter, as set forth in Disciplinary Rule XI, § 7(2).

In the matter of *In re Williams,* 464 A.2d 115 (DC 1982), the Court remanded the case for lack of procedural due process. This Court stated in support of its actions that disciplinary proceedings are quasi-criminal in nature and that an attorney who is the subject of such proceedings is entitled to procedural due process safeguards. *Id.* at 119. See also, *In re Ruffalo,* 390 US 544, 550 (1968); *In re Thorup,* 432 A.2d 1221, 1225 (DC 1981). Thus, the procedural requirements which apply in attorney disciplinary proceedings are analogous to those of contested cases. *Id.* at 119. See also, *In re Thorup, supra.*

The District of Columbia Court of Appeals Rule XI, § 10(4) places the burden of proof in a disciplinary proceeding on the Office of Bar Counsel. As a result of Bar Counsel not meeting its burden, the Court has not been exposed to the full and true disclosure of the facts because petitioner has not been given the opportunity to cross-examine the

complaining witness, which leaves unexplained crucial facts. The complaining witness has only submitted an affidavit which respondent has denied, thus raising issues of fact which procedurally entitle respondent to cross-examine the complaining witness. District of Columbia Bar Rule XI, § 7(2) states: "If there are any issues of fact raised by the pleadings . . . the notice of hearing shall advise respondent that he is entitled to . . . cross-examine witnesses. . . ." Bar Counsel did not comport with the rule because the complaining witness, against whom the issues of facts were raised, never appeared and it was Bar Counsel's obligation to bring in the witness. Petitioner should not have the burden of bringing in the out-of-country complaining witness when the affidavit submitted by petitioner clearly established and refuted issues pertaining to the facts.

In *Matter of Williams,* 464 A.2d 115 (D.C. App. 1983), a matter before the Board on Professional Responsibility, the Court of Appeals held that the finding of disciplinary violations and the recommendation of disbarment, which was not based on proof under oath, and failure to provide an evidentiary hearing denied due process of law under the U.S. Constitution.

This case presents a question that has been left undecided by this Court in that there is no decision by this Court that addresses the Constitutional issues raised in the instant case.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,

JAMES W. COBB
1004 Sixth Street, N.W.
Washington, D.C. 20001
(202) 387-1100

December 2, 1986

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that pursuant to Rules 28.3 and 28.5(b) of the Rules of the Supreme Court, I this day served three (3) copies of the foregoing Petition for Writ of Certiorari to Thomas H. Henderson, Jr., Esquire, Bar Counsel, Board on Professional Responsibility of the District of Columbia. Such service was accomplished by mailing the copies first-class and postage prepaid to counsel at the following address:

Thomas H. Henderson, Jr., Esquire
Office of Bar Counsel
The Board of Professional Responsibility
District of Columbia Court of Appeals
515 Fifth Street, N.W., Building A
Washington, D.C. 20001

By _____
James W. Cobb

Date: December 2, 1986

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APPENDIX

APPENDIX A

Office of Bar Counsel

The Board of Professional Responsibility
District of Columbia Court of Appeals

515 Fifth Street, N.W., Building A
Washington, D.C. 20001
(202) 638-1501

Date: April 8, 1983

A. Complainant: Mr. Ahdi Fahed Al-Marzouk
Chairman
International General Resources W.L.L.

Address: c/o John G. Gaine
1800 M Street, N.W.
Suite 1000
Washington, D.C. 20036

Business
Telephone: (202) 233-1300

B. Attorney Complained of:
David M. Franklin

Address: 1290 South Omni International
Atlanta, Georgia 30303

Telephone: (404) 688-2233

C. Have you filed a complaint about this matter anywhere else?

No

D. Have you brought a civil or criminal action against this Attorney?

No

E. Nature of complaint:
Negligence in representation of client; failure to deliver documents on behalf of client; failure to notify client of receipt of client funds; failure to pay over client funds; improper offset of legal fees; dishonesty; conduct involving moral turpitude; breach of fiduciary duty.

F. Details of complaint:

Mr. Franklin was retained by International General Resources W.L.L., a Kuwaiti corporation ("IGR") in May of 1981 to represent its interests in connection with transactions involving the Lake Dow subdivision in Henry County, Georgia. IGR executed a Power of Attorney authorizing Mr. Franklin to execute documents on behalf of IGR to evidence a loan from IGR to the developer of Lake Dow, Darwish International N.V., INC. ("Darwish"). Among other things, Mr. Franklin was authorized to (prepare, execute, deliver and record any and all quitclaim deeds for the release of any and all lots) from a security deed given to IGR in connection with the Loan.

Mr. Franklin was also authorized to (collect, receive and receipt any and all monies due) IGR under the terms of its Loan Agreement.

The loan from IGR to Darwish was consumated on May 20, 1981 and final loan proceeds were disbursed in August of 1981. Under the terms of of the Loan Agreement, Darwish presented to Mr. Franklin 130 quitclaim deeds to permit the release of lots from the IGR security deed in the event of lot sales. Under the Loan Agreement, these quitclaim deeds were to be delivered to Pioneer National Title Insurance Company, Escrow Agent for the transaction. Notwithstanding the fact that Mr. Franklin's only responsibility was to sign and deliver the quitclaim deeds, he totally failed to carry out this simple assignment.

Mr. Franklin's failure to deliver the quitclaim deeds to the Escrow Agent caused the Escrow to fail which meant that the security deed from Darwish to IGR was never recorded. The result of Mr. Franklin's negligence was to leave IGR with a $1,105,000 loan for approximately eighteen (18) months without a properly recorded security instrument.

Another responsibility given to Mr. Franklin under the initial Loan Agreement was to receive payments from Darwish under the loan. In June or July of 1982, Darwish sent to Mr. Franklin an interest payment of approximately $21,282 for the account of IGR. The complainant is informed that the Darwish check was deposited by Mr. Franklin in his law firm's regular account, not in a trust account. Mr. Franklin gave IGR no notice of his receipt of this amount for over six months until after IGR sent Mr. Ernest W. Alexander, IGR's attorney from Kuwait, to investigate the situation. On December 15, 1982, long after his receipt of the interest payment, Mr. Franklin sent a letter to Mr. Al-Bedah of the Kuwait Financial Center, Agent for IGR. In this letter, Mr. Franklin first made mention of the funds received, but before remitting the proceeds, he made an offset of $6,487, which he claimed to be owed for legal fees and enclosed a check for the difference, namely, $14,795. Upon presentation of that check for collection, it was returned for insufficient funds.

Under the circumstances, IGR requested and obtained from Mr. Franklin a renunciation of his power of attorney and gave him a written demand taking issue with his right to offset legal fees, demanding a full accounting of all monies received by Mr. Franklin on IGR's behalf and asking for a detailed statement of legal services for which Mr. Franklin claimed to be owed. Further, because of the returned check, IGR made a statutory demand on Mr. Franklin and finally received, on or about February 10, 1983, a cashier's check for $15,555.50. To this date, Mr. Franklin has not responded to the demand for a remittance of the sum of $6,487, for a full accounting of monies received or for a detailed description of legal services which would justify the $6,487 in fees claimed by Mr. Franklin.

Complainant believes that Mr. Franklin has injured IGR through his violations of D.R. 9-102, 1-102(3) and 1-102(4) of the District of Columbia Code of Professional Responsibility.

/S/

Ahdi Fahed Al-Marzouk
Chairman
International General Resources W.L.L.
Ernest W. Alexander
The Law Bureau
P.O. Box 2578
Safat, Kuwait
Telephone: 447447 or 412812
ATTORNEYS FOR COMPLAINANT

LOCAL COUNSEL FOR COMPLAINANT
Michael K. Madden
John G. Gaine
Robert C. Lower
Alston & Bird
1800 M Street, N.W.
Suite 1000
Washington, D.C. 20036
Telephone: (202) 233-1300

APPENDIX B

DISTRICT OF COLUMBIA BAR
RECEIVED HAND DELIVERED SEPT 28 1983
OFFICE OF BAR COUNSEL

Franklin & Axam
Attorneys at Law
Suite 1290 South, Omni International
Atlanta, Georgia 30303
(404) 688-2233

September 26, 1983

David M. Franklin
Tony L. Axam

Lisa D. Cooper

Edwin Yourman
Deputy Bar Counsel
515 Fifth St., N.W.—Bldg. A
Washington, D. C. 20001

Re: Franklin/Madden Docket No.: 48-43

Dear Mr. Yourman:

Listed below is my response to the erroneous complaint filed with you by Ahdi Fahd Al-Marzouk of Kuwait. I have also enclosed copies of documents which are in my possession and which also are in the possession of the complainant since I turned over my complete files to the complainant's representative. The facts are as follows: I was in Kuwait with former Ambassador Andrew Young in April, 1980 when Mr. Al-Marzouk asked me to assist him with a matter in Georgia. In late April, 1980 Al-Marzouk retained my firm to advise him financially and legally on three (3) land lots he had previously bought unseen in Georgia, and a possible further investment in an adjacent planned golf course developed by the same seller, Darwish Hussamy. The complaint filed with you stated that I was retained in May, 1981 which is completely false (see Attachment A).

Relying on Mr. Al-Marzouk's request for services I retained a certified M.A.I. Appraiser and a law firm that specialized in title searches in that county in Georgia. Within sixty (60) days I submitted to Mr. Al-Marzouk in Kuwait a 50-page appraisal with photographs, a legal title report, copies of the seller installment sales contract and deed, and other information. Please note my July 9, 1980 cover letter (see Attachment A) in which I strongly urged Mr. Al-Marzouk to withdraw from the investment because the seller, Darwish, had conveyed a fraudulent general warranty deed in that the seller did not own the land in question but was purchasing it on an installment basis (see Attachment A). I strongly recommended that the investment was a fraud and had no chance whatsoever of success because the land lot cost of $35,000 to $60,000 per vacant lot was 300 to 400 per cent higher than land selling in the general area according to the M.A.I. Appraisal.

Subsequent to my July, 1980 report Mr. Al-Marzouk met in Kuwait with Darwish in Fall, 1980 and began negotiating a preliminary 50% interest purchase of the entire project. Against my personal objections, I was then asked to conclude the negotiations in the best manner available to Al-Marzouk.

This purchase agreement for the land was not completed until May 20, 1981 because of negotiations complicated by the sudden absence of Al-Marzouk. For a period of five (5) months, although directed by Mr. Al-Marzouk to negotiate for him, he was unavailable by phone for any consultation. I made numerous calls to his office and was instructed that he was not available and not in the country. Finally, after several months, Darwish Hussamy informed me that Al-Marzouk had an illness and had been in Cairo, Egypt during that time. I was unable to obtain any information about this from his office or his assistants. At this point my legal fees were unpaid for over nine (9) months. No one in his office volunteered any information except that he was not available.

Subsequently, Al-Marzouk returned to Kuwait and I travelled there at his request in April, 1981. In May, 1981 I was tendered a check for my fees by Darish, (see Attachment B) the person to whom I was asked to observe, watch, and monitor by Al-Marzouk. At this point the legal fees were paid for the previous twelve (12) months.

Concerning the security deed, Al-Marzouk knew that Darwish would not present the Quit Claim Deeds until the entire loan amount was paid which was not until August, 1981. Furthermore, there were extensive cables and conversations with Al-Marzouk about establishing a Netherlands Antilles Corporation for his company in order that he would not be taxed under U. S. law. Al-Marzouk first stated that Darwish would do it for him and then several months later asked me to look into it. This caused a delay because we did not know what corporate name to affix to the deed, a Kuwaiti corporation which would be fully taxed under U. S. law or a Netherland Antilles corporation which would not be taxed under U.S. law. All during this time, I was still advising Al-Marzouk that the project was not feasible and urged that Al-Marzouk terminate the agreement because of the total impractically of the project. Additionally, I stated that since the first interest payment was due in less than 120 days, December, 1981, if Darwish did not pay a default would occur, and we could foreclose on the loan, recover the land, or a combination of remedies. The complaint alleged that I was negligent. *The facts show that there was no financial damage to Al-Marzouk from my actions. And I predicted no lots were sold during the entire period so consequently there were no deeds to transfer.*

Now as to the receipt of the $21,282. The $21,282 was deposited to a trust account (see Attachment C) and *not* as the complaint alleged in a law firm regular account (see Attachment C). Furthermore, Al-Marzouk sent a representative, Vartkes Alahaidoyan to Atlanta in May, 1982 after Darwish had not paid the December, 1981 interest payment

and I was again imploring Al-Marzouk to foreclose. After meeting with Darwish accompanied by Al-Marzouk's personal representative, Darwish forwarded *Attachment B* which Al-Marzouk's representative received. This attachment states that on June 4, 1982, Darwish was to deliver a check which was deposited in my trust account and was returned insufficient. I called Vartkes and informed him that I had contacted Hussamy and given him ten (10) days to make the check good with certified funds. I again called Vartkes, in June, when that certified check was received by me. I asked him where should the funds be sent since these were the first and only funds ever received by me.

Vartkes said he did not know, but stated that he would be seeing Al-Marzouk within the next several weeks and would inform him the matter at hand was completed.

I made several calls to Kuwait. In September one of Al-Marzouk's assistants called from Kuwait about a new legal matter in California regarding auto parts. I discussed with the assistant the fact that I was in receipt of funds, and also had a legal bill due, and asked what to do. The assistant had no knowledge of the situation and informed me they would have to speak with Al-Marzouk. Additionally, the assistant later sent materials to me concerning the new matter.

I assumed that Al-Marzouk had disappeared for the second time, and I was to wait until he contacted me. After the previous year's events, I was not not surprised at the absence of contact from Al-Marzouk, his personal representative, or his assistant.

My next contact with Al-Marzouk came in a letter from him dated December 7, 1982 in which I finally received instructions and a person's name to forward information to (see Attachment D).

I immediately did so (see Attachment D). Within two days, Mr. Alexander appeared in Atlanta and notified me he was Al-Marouk's personal representative and inquired

about the project. Again, I had to start from scratch. I explained that the first contact I had had with Al-Marzouk in several months was his December correspondence. I explained that very little of my advice had been followed and along with the sudden absences of contact which were never explained was obviously a disadvantage to me as well as to Al-Marzouk. I notified Alexander at that time that I had received a prior communication from Al-Marzouk and had forwarded everything to the representative listed. I gave Alexander copies of the cover letters including the statement of services. I tendered a renunciation of my power of attorney at this meeting and not in February as the complaint alleges.

In summary, in this initial meeting with Alexander, less than three (3) days after receiving contrary instructions from Al-Marzouk, I gave an accounting of the funds and, a description of legal services and expenses, and a renouncement of my duties (see Attachment E).

Later, when I was notified that the check had not been honored, I immediately obtained a Cashier's check for more than what was due even though the check could have been presented a second time. There was no damage to IGR or Al-Marzouk in funds or in land security.

In retrospect I should have withdrawn from the case when my original advice was not followed and I was not able to establish a clear line of contact with Al-Marzouk at all times. At each point a personal representative was presented to me, I endeavored to work with that person. The first representative received copies of the agreement, and notification of the payment. Yet he did not inform Al-Marzouk of this. The second representative received copies of all correspondence in my files, and of the cover memo clearly stating the funds received to date, and an

explanation of services rendered. Yet the complaint does not state that Al-Marzouk received this information. In both cases, I do not know why since both representatives presented themselves with full authority from Al-Marzouk.

Respectfully submitted,

/S/

DAVID M. FRANKLIN

The First National Bank of Atlanta

DAVID M FRANKLIN & ASSOCIATES
TRUST ACCOUNT
1290 SOUTH OMNI INTERNATIONAL
ATLANTA GA 30303

DT 16-061-302
0061
94 06/30/82

FOR ADDRESS CHANGE DETACH AND FILL OUT BACK

PLEASE USE YOUR ACCOUNT NUMBER ON ALL CHECKS AND DEPOSITS

19,382.11	87	93,291.67	7	80,602.89	.00

6/01	358.00	577.53	
	1,262.67	1,877.20	
6/02	200.00	350.00	
	3,000.00	3,308.33	
6/03	10.00	10,000.00	
6/07	10.00	10.00	
6/08	20.00		
6/09	50.00	7,000.00	21,282.00
6/10	500.00	1,500.00	
	1,500.00	2,000.00	
6/11	125.00	1,000.00	3,584.11
	3,722.00		
6/14	300.00	2,000.00	
6/15			6,500.00
6/16	1,585.00	587.09	
	1,094.50		
6/17	321.14		
6/18	321.14	3,058.23	
	-321.14		
6/21	50.00	321.14	
	321.14	321.14	
	321.14	638.28	
6/22	60.00	638.28	414.78
6/23	20.00		60,000.00
6/24	125.00	321.14	
	638.28	853.43	
6/25	131.00	314.14	8,000.00
	317.14	321.14	
	321.14	321.14	
	638.28	1,000.00	
	1,585.70	2,500.00	
	3,150.00	6,500.00	
	221.97	317.10	
	10,000.00		
6/28	100.00	915.42	

ATTACHMENT C

MT MONEY TRANSFER
CM CREDIT MEMO
DM DEBIT MEMO

AB BOOKKEEPING ADJUSTMENT
SC SERVICE CHARGE
RT RETURNED ITEM

AL LOCKBOX ADJUSTMENT
AC AUTOMATIC CHARGE
IS ISSUE OF CHECKS

APPENDIX C

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the matter of :
:
DAVID M. FRANKLIN,

Bar Docket Number: 48-83

A Member of the District
of Columbia Bar
Bar No. 199505

EXCEPTIONS TO THE REPORT AND RECOMMENDATION OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

I. BACKGROUND

A. This matter is before the Court on the report of Hearing Committee Number Five, dated June 26, 1985 and the report of the Board on Professional Responsibility dated November 4, 1985.

An evidentiary hearing was held on January 3, 1985, before the Hearing Committee. Respondent was out of the country and consequently, not present at the hearing. He was, represented by counsel, James W. Cobb, Esquire.

Both Respondent and Bar Counsel were provided an opportunity to supplement the record after the hearing and both did so.

The Hearing Committee found that Respondent had violated DR9-103(A)—misappropriation, DR1-102(A)(4)—dishonesty, and DR6-101(A)(3)—neglect. The Committee recommended that Respondent be disbarred from the practice of law.

The Board on Professional Responsibility agreed with the findings of the Hearing Committee and the recommended sanction.

II. EXCEPTIONS

1. The Hearing Committee erred in admitting and in accepting the exhibits. No testimony in support of the complaints was ever adduced, and Bar Counsel was never required to produce real or uncontradicted evidence of the disciplinary violations.

2. The procedures followed by the Hearing Committee in the petitions violated the Respondent's due process right against self-incrimination. The charges in the petition clearly involved allegations that were almost criminal in nature. The Hearing Committee concluded in its findings upon these two counts that the Respondent converted funds to his own use. The Respondent has thus been found guilty of criminal conduct by the Committee in the absence of proof of charges by Bar Counsel of the conduct alleged with an opportunity provided to Respondent to contest such proof, the Respondent's countersubmissions alone are sufficient to refute the charges.

3. The Hearing Committee erred in recommending the disbarment of Respondent without first finding that the allegations in the petitions were supported by clear and convincing evidence, and without making its own findings of fact rather than just adopting the allegations of the petitions.

4. The sanction of disbarment is not justified by the record or other matters before the Board or this Court.

III. CONCLUSIONS

It is clear from the foregoing that numerous errors were made in the administrative proceedings below and that Respondent was deprived of his due process rights warranting a dismissal of the petitions against him.

Respondent therefore requests that this Court set this matter for the filing of briefs and oral argument pursuant to Rule XI, Sec. 7(3).

In view of the seriousness of the discipline recommended, and it appearing that this appeal calls into questions serious due process issues regarding the rules and procedures governing the Board on Professional Responsibility, it is submitted that the findings and the sanctions of the Board be reversed.

Respectfully submitted,

/S/

JAMES W. COBB
Attorney for Respondent
1004 Sixth Street, N.W.
Washington, D. C. 20001
387-1100

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed, postage prepaid, to Samuel McClendon, Assistant Bar Counsel, 515 5th St., N. W., Wash., D. C. 20001, this 25th day of November, 1985.

/S/

JAMES W. COBB,
ESQUIRE

APPENDIX D

District of Columbia
Court of Appeals

Filed Dec 5, 1985
/S/ Clerk
48-83

DISTRICT OF COLUMBIA COURT OF APPEALS
500 Indiana Avenue, N.W.
Washington, D.C. 20001

No. 85-1643

In the Matter of
DAVID M. FRANKLIN
A Member of the Bar of the
District of Columbia
Court of Appeals

O R D E R

It appearing that the Board on Professional Responsibility of this court, pursuant to Rule XI, §7 of the Rules Governing the Bar of the District of Columbia, has submitted its findings in the above-entitled matter and respondent having filed exceptions to said Report, it is

ORDERED that the brief of respondent shall be filed within 40 days from the date of this order, and the brief of Bar Counsel shall be filed within 30 days from the date on which the brief of respondent is filed.

BY THE COURT:

/S/
WILLIAM C. PRYOR
Chief Judge

Copies to:

James W. Cobb, Esquire
1004 6th Street, N.W.
Washington, D.C. 20001

Thomas H. Henderson, Jr., Esquire
Bar Counsel
Board on Professional Responsibility

Mark W. Foster, Esquire
Chairman
Board on Professional Responsibility

APPENDIX E

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 85-1643

In the Matter of
DAVID M. FRANKLIN,
D.C. Bar No. 199505 48-83

On Appeal from the Board on Professional Responsibility

REPLY BRIEF OF RESPONDENT DAVID M. FRANKLIN

JAMES W. COBB, ESQUIRE
1004 Sixth Street, N.W.
Washington, D. C. 20001
(202) 387-1100

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THE STATEMENT OF THE CASE

This matter is before the Court on the report of Hearing Committee Number Five, dated June 26, 1985 and the report of the Board on Professional Responsibility dated November 4, 1985.

An evidentiary hearing was held on January 3, 1985, before the Hearing Committee. Respondent was out of the country and consequently, not present at the hearing. He was represented by counsel, James W. Cobb, Esquire.

Both Respondent and Bar Counsel were provided an opportunity to supplement the record after the hearing and both did so.

The hearing Committee found that Respondent had violated DR9-103(A)—misappropriation, DR1-102(A)(4)—dishonesty, and DR6-101(A)(3)—neglect. The Committee recommended that Respondent be disbarred from the practice of law.

The Board on Professional Responsibility agreed with the findings of Hearing Committee and the recommended sanction.

ARGUMENT

I. RESPONDENT HAS BEEN DENIED PROCEDURAL AND SUBSTANTIVE DUE PROCESS AND THEREFORE THIS PROCEEDING SHOULD BE DISMISSED OR REMANDED WITH INSTRUCTIONS.

The District of Columbia Bar Disciplinary Rule XI, §7(2) states:

> "[i]f there are any issues of fact raised by the pleadings, or if the Respondent requests the opportunity to be heard in mitigation, the hearing committee shall serve a notice of hearing upon Bar Counsel and the Respondent, or his counsel, stating the date and place of the hearing . . . shall advise the Respondent that he is entitled to be represented by counsel, to cross-examine witnesses, and to present evidence on his own behalf."

In the case at bar, Respondent has not been allowed the opportunity to cross-examine the petitioner's missing witnesses based upon the issues. This is even more serious by the fact that contrary affidavits and exhibits were submitted by both Respondent and petitioner's witnesses.

In the matter of *In re Williams,* 464 A2d 115 (DC 1982), the Court remanded the case for lack of procedural due process. This Court stated in support of its actions that disciplinary proceedings are 'quasi-criminal' in nature and that an attorney who is subject of such proceedings is entitled to procedural due process safeguards." *Id.* at 119. See also, *In re Ruffalo,* 390 US 544, 550 (1968); *In re Thorup,* 432 A2d 1221, 1225 (DC 1981). Thus, "the procedural requirements which apply in attorney disciplinary proceedings are analogous to those of 'contested cases'. *Id.* at 119. See also, *In re Thorup, supra.*

In the case of *In re Thorup, supra,* the court dismissed the petition because "the committee improperly used letters written by Walton (the petitioner's witness) as substantive evidence." *Id.* at 1226. The Court further stated that "the Hearing Committee was not correct in accepting the docket entries as establishing the charge and then shifting the burden to the Respondent to explain his actions." *Id.* at 1226.

In the case at bar, Bar Counsel has relied only on documents and letters to support its case. Petitioner's missing witnesses were not subpoenaed nor required to testify; thus, the Hearing Committee nor the Board on Professional Responsibility had an opportunity to observe the missing witnesses' demeanor, etc. The observed demeanor and right of cross-examination demeanor (a part of testimonial) evidence is important for it helps the trier of the facts, the Hearing Committee or the Board on Professional Responsibility and Respondent's counsel to help determine the facts, i.e., innocence or guilt and truth as opposed to non-truth.

Also, the fact that Respondent's affidavit and exhibits disputed petitioner's affidavit emphasized and dramatized the need for cross-examination in this matter, more than any other, as set forth in Disciplinary Rule XI, §7(2). This raised a question of fact that even under Civil Rule 56 of the Superior Court of the District of Columbia would not support Summary Judgment or disposition in view of what this record reflects.

The matters which were entrusted to Mr. Franklin were, in fact, completed and any remaining disputes that may have remained were of a civil nature, pure and simple. This was the only reason counsel was employed to seek damages in any way possible. To accomplish this, the law firm first initiated the proceeding by the preparation of Interrogatories for their client to sign and with suspect motives have their client appear to document the specific alleged violations of the District of Columbia Code of Professional

Responsibility (B.C.Ex.1). After an answer with explanation was submitted by Respondent (B.C.Ex.2), Counsel remained unsatisfied or presumed that Bar Counsel's office was incapable of doing what it is chartered to do, proceeded literally to lecture Bar Counsel in a Twelve (12) page brief on why charges should be filed against Respondent. (B.C.Ex.3) If it does not raise professional/ethical questions regarding the other submissions while omitting intentionally or refusing to respond to the defense of other affairs between Respondent and the missing witnesses. It is insulting to the Office of Bar Counsel, the Disciplinary process and this Court for these exhibits and submissions to have the effect of reducing this process to that of a collection agency. Their letter dated January 19, 1984, stating that they would accept One Hundred Thousand ($100,000) Dollars as settlement based on disputed damages in exchange for halting this procedure (R-E01), is a monument to that suspicion to which this Court should not become an instrument. There have been no damages sustained by the parties and any delays were the result of unrefuted judgment and caution exercised by Respondent that his client not be the subject of a fraudulent scheme. Whether in error or not this was a decision and coupled Respondent's unrefuted claim of his inability to confer regularly with the missing witness or the alternative (alter ego) corporate entity. Respondent's affidavit reaffirms his letter to Bar Counsel that there were additional matters between the parties (B.C.Ex.2). It is not denied by new counsel that there is no damage in spite of their effort to extract ($100,000). This is even more suspicious and should be considered by this court in weighing the procedural and substantive due process considerations. Counsel could not improve upon the justification for this argument than the quote from the Amendments of the Constitution of the United States which succinctly and appropriately provide:

Fifth (V) Amendment

"no person . . . shall be held to answer for a capital or otherwise infamous crime, . . . nor be deprived of life, liberty, or *property without due process of law . . .*"

Sixth (VI) Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy trial. . . . to have confronted *with the witnesses against him;* to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defen(c)e."

Fourteenth (XIV) Amendment

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States . . . nor shall any state *deprive* any person of life, liberty, or property without due process of law . . ."

It is interesting that in this same exhibit new counsel offers to pay Respondent whatever is owed, on the other hand, attempt to extract One Hundred Thousand ($100,000) Dollars.

II. THE SANCTION OF DISBARMENT IS NOT JUSTIFIED BY THE RECORD OR OTHER MATTERS PRESENTED BEFORE THE BOARD OR THIS COURT

In the matter of *In re Banks,* 461 A2d 1038 (DC App 1983), the Court held that neglect of professional obligations may warrant public censure. In this matter, Respondent had been privately reprimanded twice before. Once for a similar incident. The Hearing Committee stated "we might have considered a reprimand the appropriate sanction in this case. However, we are bound to take into

account Respondent's record of prior discipline." *Id.* at 1042.

In this case at bar, Respondent had no prior reprimands of admonitions or dereliction.

Respondent's charges in *In re Banks, supra,* were not compounded with other disciplinary violations. However, the Hearing Committee seems to suggest that had Respondent's charge been compounded, the ordinary sanction might be "a suspension of six months." *Id.* at 1043.

In the present case, although Respondent was charged with more than one violation, the Hearing Committee seemed to ignore the charge relating to misconduct involving dishonesty and moral turpitude (BPR Rep. and Recom. n.1).

However, the incontradicted evidence supports the position that this Respondent did not neglect the complainant's interest for he diligently strived to gain the information needed to serve his "post-client" in the best possible way.

This is to clear because petitioner's missing witnesses did not even offer any expert testimony as to a better method of handling their matters.

In the matter of *In re Reback,* 487 A2d 235 (DC App 1985), Respondent's Reback and Parsons were suspended for a year and a day after being convicted of neglect of a legal matter, forgery, misrepresentation as to the status of client's case, and filing a false statement.

The complainant had apparently hired Respondents to handle her divorce case. Time elapsed after filing of the first complaint and the case was dismissed. Respondent Reback prepared another complaint similar to the first and forged petitioner's name in front of Respondent Parsons, had the pleading notarized, and the complaint was filed with the Court.

These were serious and almost criminal offenses, but because of Respondent's previous record the above sanction was reached. "[T]he fact that an attorney has had no prior disciplinary actions is "highly relevant and material" to the determination of sanctions." *Id.* at 244. See also, *In re Cope,* 455 A2d 1357, 1361 (DC 1983).

Again, in the matter of *In re Reback, supra,* Respondents were also accused of gregious negligence since complainant's brother continuously contacted Respondent concerning his sister's divorce case. The Court held that clear and convincing evidence had not been given to support a finding that his neglect was conscious or intentional since the Respondent had not fabricated excuses. He had honestly felt that he was working on behalf of his client's interest and that these matters should be heavily weighed in determining any sanction of Respondent.

In the matter of the *Office of Disciplinary Counsel v. Lewis,* 426 A2d 1138 (Pa. 1981), the presiding Judge held that

> "the commingling and converting of client funds, misrepresenting" that certain bills had been paid, "and neglecting and intentionally failing to properly represent client [sic] warrants disbarment." *Id.* at 1138.

However, the Judge reached that decision based on the Respondent's past admonitions and his failure to make restitution.

Our client has no prior record of informal admonitions, has not been convicted of misconduct, and has assured that there were no legal or financial losses.

In a relatively more serious matter, *In re Gilchrist,* No. 84-1162 (DC App 1985), the Court held that public censure was the sanction to impose. In this instance, Respondent had deposited a $1,500.00 dollar settlement check into his personal bank account. He wrote various checks causing

the balance to drop below the deposited amount for three months.

The court considered the Respondent's testimony as "barely hold together and raises several questions. [sic]" However, his testimony was considered credible.

In the case at bar, Respondent's testimony too, should be considered credible since he has been barred in the District of Columbia for numerous years and has never been reprimanded for any dereliction in the past.

Although the Bar Counsel alludes to Respondent being overdrawn at the time the $21,282.00 dollar check was deposited, there was an unanswered question which was therefore an issue as to whether the Complainant owed Respondent $6,487.00 dollars. Arguendo, the remaining balance in Respondent's account was surely enough to cover what may have been due between either party.

In the matter of *In re Harrison,* 461 A2d 1034 (DC App 1983), the Court held a Respondent should be suspended from practice for a year and a day. *Id.* at 1035. In this mattter, Respondent endorsed a check received in settlement of a personal injury matter and deposited it into a general funds account on October 12, 1979. When the client inquired as to his portion of the settlement, Respondent claimed that he was extremely busy. Subsequently, Respondent wrote the client a check which returned for insufficient funds. In addition, Respondent had not paid medical bills for petitioner which he had agreed to do until January, 1980.

The Court cited *In re Wilson,* 81 N.J. 451, 455 n.1, 409 A2d 1153, 1155 n.1 (1979) as containing the appropriate definition of misappropriation of funds. [M]isappropriation is any unauthorized use of client's funds entrusted to him, including not only stealing but also unauthorized temporary use for the lawyer's own purpose whether or not he denies any personal gain or benefit therefrom."

Further, in the present case, Respondent received and deposited funds into an account belonging to him as "disputed offset" given additional funds on deposit with his Bank which is uncontraverted in addition to what should be construed as a disputed offset in the absence of evidence to the contrary.

In re Harrison, supra, the Court stated that disbarment was the ordinary sanction for misappropriation cases in the past, but that Harrison relied upon his account balance rather than his running balance and that "did justify a lesser sanction". *Id.* at 1036.

In this matter, Respondent relied on his account balance as opposed to his running balance. He never avoided his client and corrected the oversight immediately.

In the matter of *In re Quimby,* 359 F2d 257 (1966), the Court held that the embezzling of funds justified disbarment. In that case, appellant withdrew large sums of money from estate accounts to ease his financial burden. *This is not the case here.* The funds which were withdrawn from the account could at the most be considered as "commingled" as opposed to "embezzled" funds. Respondent did not wrongfuly convert nor fraudulently take any funds from the account. Respondent has continually taken the position that he was due certain additional funds for other services rendered and other ventures with the petitioners' missing witnesses.

In the Matter of Burton, 472 A2d 831 (DC App 1984), this Court recommended disbarment after finding that the Respondent had commingled and misappropriated funds in addition to misappropriation of funds in another matter.

By comparison, in this matter, Respondent did not misrepresent anything that he had done on behalf of Petitioner's missing witness, nor did he make any misrepresentations to the Bar Counsel. His position has been consistent

and clear and at the very least represent an honorable question of fact deserving of some medium of respect if not due constitutional considerations.

In this matter, Respondent has had no prior disciplinary record nor is there clear and convincing evidence that he intentionally misappropriated the missing witnesses' funds.

In the matter of *In re Hines*, No. M-141-82 (DC App 1984), Respondent was charged with violation of disciplinary rules in two cases pertaining to the misappropriation of funds. Again by way of comparison, the court held that Respondent should be suspended for two years although the Hearing Committee recommended public censure. The Court based its conclusion on the fact that Respondent had two similar charges against him and that he had violated other disciplinary rules. In addition, Respondent's conduct was not confined to one client.

In the case at bar, Respondent has been accused of misappropriating funds of one client and the facts could be considered similar to *Hines, supra.* Accordingly, it is respectfully urged that the Court should find in this instance, that at the most, Respondent's conduct constituted simple negligence and impose a lesser sanction, pursuant to BPR Rule XI, §7(3) which states:

> In considering the appropriate order, the Court shall accept the findings of fact made by the Board unless they are unsupported by substantial evidence of record, and shall adopt the recommended disposition of the Board unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or otherwise would be unwarranted. *Id.* at 1314.

Respondent submits that BPR Rule XI, §7(3) should apply because the Board's recommendation of disbarment would be inconsistent with comparable conduct as noted in the cited cases. It suggests what some members of this Bar have felt—that there are dual standards.

CONCLUSIONS

First, it is respectfully submitted that there is in fact, no violation of any provision of the Code on Professional Responsibilitiy. Respondent should not be subjected to this process to serve as a method for some other suspicious reasons.

Second, as argued previously, upon reflection any of us might perform a service better or differently, but it does not appear that any sanction against this Respondent should result in disbarment. His actions do not justify the chages and specification, nor this maximum sanction.

Respectfully submitted,

/S/

JAMES W. COBB
Attorney for Respondent
1004 Sixth Street, N. W.
Washington, D. C. 20001
387-1100

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Reply Brief, was hand delivered to Office of Bar Counsel, Thomas H. Henderson, Jr., Bar Counsel, Board on Professional Responsibility and to Mark W. Foster, Chairman, Board on Professional Responsibility, 515 - 5th Street, N.W., Washington, D. C. 20001, this 9th day of January, 1986.

/S/

JAMES W. COBB, ESQUIRE

APPENDIX F

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 85-1643

In the Matter of

DAVID M. FRANKLIN

A Member of the Bar of the
District of Columbia
Court of Appeals

BRIEF FOR THE
OFFICE OF BAR COUNSEL

THOMAS H. HENDERSON, JR.
Bar Counsel
Bar Number 144089

SAMUEL MCCLENDON
Assistant Bar Counsel
for Special Litigation
Bar Number 316828

Office of Bar Counsel
515 - 5th Street, N.W.
Building A, Room 127
Washington, D.C. 20001
Telephone: 638-1501

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 1643

In the Matter of

DAVID M. FRANKLIN

A Member of the Bar of the
District of Columbia
Court of Appeals

CERTIFICATE REQUIRED BY RULE 28(a)(1) OF THE GENERAL RULES OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

The undersigned, counsel of record for Bar Counsel, District of Columbia Bar, certify that the following list of parties appeared below:

District of Columbia Bar

/S/

James W. Cobb, Esquire

This representation is made in order that Judges of this Court, *inter alia,* may evaluate possible disqualification or recusal.

/S/

Thomas H. Henderson, Jr.
Bar Counsel

/S/

Samuel McClendon
Attorney of Record
for Bar Counsel

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ISSUES PRESENTED

I. Whether Respondent was denied procedural or substantive due process.

II. Whether disbarment is the normal sanction for misappropriation absent extenuating circumstances.

STATEMENT OF CASE

Background

On November 8, 1984, Bar Counsel filed a petition against Respondent in the above matter. On January 3, 1985, a hearing was held before Hearing Committee Number Five, comprised of George W. Miller, Esquire, Chair, and Wendell P. Gardner, Esquire.

Respondent was not present at the Hearing but was represented by counsel. Bar Counsel did not call any witnesses but relied on documentary evidence to prove his case.

On June 26, 1985, the Hearing Committee filed its report with the Board on Professional Responsibility (Board). In its report to the Board, the Hearing Committee found that Respondent violated Disciplinary Rule 9-103(A) of the Code of Professional Responsibility when he misappropriated client funds. (H.C. Rpt. at 9).[1] The Hearing Commit-

[1] "H.C. Rpt." refers to the Hearing Committee's report. "Bd. Rpt." refers to the Board's report. "Tr." refers to the transcript of the hearing. "BE" refers to Bar Counsel's exhibits. "RE" refers to Respondent's exhibits.

tee also found that Respondent violated Disciplinary Rule 1-102(A)(4) because his unauthorized use of client funds constituted dishonesty within the meaning of that rule. (H.C. Rpt. at 11). Further, the Hearing Committee found that Respondent violated Disciplinary Rule 6-101(A)(3) because Respondent's failure to record a $1,105,000 loan for approximately a year and four months constituted neglect of a legal matter entrusted to him. (H.C. Rpt. at 7).

On July 15, 1985, Respondent filed exceptions to the Hearing Committee's Report. Subsequently, the Board on Professional Responsibility established a briefing schedule and set oral argument for September 26, 1985.

On November 4, 1985, the Board filed its Report and Recommendation (Bd. Rpt.) with this Court. The Board adopted the findings of fact of the Hearing Committee as supported by substantial evidence of record and adopted the Hearing Committee's recommendation that Respondent be disbarred. Subsequently, Respondent noted exceptions to the Board's report.

FACTS

The Undisputed Facts Found by the Hearing Committee and Adopted by The Board are as Follows:

On May 20, 1981, International General Resources W.L.L. (IGR) entered into a loan agreement with Darwish International N.V., Inc., (Darwish), whereby IGR loaned Darwish $1,105,000 to be secured by a security deed from Darwish to IGR on 130 lots located in Henry County, Georgia (Bar Counsel Exhibits (BE 5 and 6)).

The loan agreement provided that the lots comprising the secured property would be released

from the security deed as they were sold by Darwish and repayment was made to IGR. Under paragraph 7 of the agreement, IGR was expressly required to deliver executed quitclaim deeds for each lot within the secured property to the escrow agent, Pioneer National Title Insurance Company, "[s]imultaneously with execution and delivery of the [executed] security deed. . . ." (BE 5). Upon delivery of the executed quitclaim deeds, the escrow agent would record IGR's security interest in the property. (BE 14).

On April 22, 1981, IGR gave Respondent a Power of Attorney authorizing him, *inter alia*, to: 1) execute the loan agreement on behalf of IGR; 2) execute the quitclaim deeds; and 3) deliver the quitclaim deeds to the escrow agent, thereby insuring that the security deed protecting IGR would be recorded. (BE 4).

Pursuant to the loan agreement, Darwish executed and notarized the security deed on August 14, 1981. (BE 8).

On August 17, 1981, Darwish delivered the deed to the escrow agent. (BE 7). That same day Darwish sent to Respondent the quitclaim deeds. (BE 8). It was then Respondent's responsibility to execute the quitclaim deeds and deliver them to the escrow agent so that the security deed could be recorded, thereby protecting IGR's interest.

Between August and November, 1981, Respondent received repeated inquiries from IGR and Darwish asking why he had not executed the quitclaim deeds so that the security deed could be recorded. (BE 9, 10, 11, 12 and 13).

In June 1982—ten months after it was Respondent's duty to act—Respondent received a letter from the escrow agent informing him that the

security deed remained unrecorded. Respondent did nothing. IGR's $1,105,000 loan to Darwish remained unsecured. (BE 14).

On December 18, 1982—over 16 months after it was Respondent's duty to act—IGR revoked the power of attorney given to Respondent. (BE 16 and 17).

Four days later, on December 22, 1982, new counsel had executed the quitclaim and IGR's security was recorded. (BE 18).

In addition to authorizing Respondent to act on IGR's behalf in connection with the loan agreement, the Power of Attorney from IGR to Respondent authorized Respondent to "collect, receive, and receipt any and all monies due the corporation under the terms and conditions of the loan agreement, whether as repayment of principal or payment of interest, or otherwise, and to remit same as provided under the terms and conditions of the Loan Agreement." (BE 4).

On or about June 8, 1982, Respondent received from Darwish a check for $21,282 made payable to IGR (BE 23). This check represented the first payment due IGR under the loan agreement. (BE 19).

On June 9, 1982, Respondent deposited the check into an account at the First National Bank of Atlanta, No. 16 061 302, labeled "David M. Franklin and Associates Trust Account." (BE 24 and 24a).

David M. Franklin and Associates is a management and consulting firm. At the time, Respondent's law firm was Franklin & Axam. The law firm had a distinct and separate escrow account, but Respondent did not deposit the IGR check into that escrow account.

On the day Respondent deposited the check for $21,282 in the "David M. Franklin and Associates Trust" account, his balance was overdrawn by $1,602.62. (BE 24). Thus, immediately after Respondent deposited the check, the balance in the account was $19,680.38. (BE 24).

That same day, checks against the account for $50 and $7,000 cleared, causing the balance in the account to fall to $12,630.38, a sum well below the $21,282 which Respondent owed IGR. (BE 24).

Subsequently, Respondent made other withdrawals from the account not related to his representation of, and not authorized by, IGR. On July 12, 1982, the balance fell to $11.60. (BE 28). The account was overdrawn in October and December of 1982. (BE 28 and 30).

On December 15, 1982, Respondent wrote a check to IGR for $14,795, a sum which represented the difference between the $21,282 Respondent had received on IGR's behalf less $6,487 which Respondent claimed as a fee or "disputed offset." (BE 32).

IGR deposited the check for $14,795 but it was returned due to insufficient funds in Respondent's trust account. (BE 32).

ARGUMENT

I. Respondent Was Not Denied Procedural or Substantive Due Process

Respondent argues that he was denied his Sixth Amendment right of confrontation because the complainant (his client) was not called by Bar Counsel as a witness at the evidentiary hearing. As Respondent argued in his brief, he "has not been allowed the opportunity to cross-examine the petitioner's missing witnesses based upon the issues." (Resp. Brief at p. 1). Under Rule XI, Section 13(1), of the Rules Governing the District of Columbia Bar, "A Respondent may, subject to Superior Court Civil Rule 45, compel by subpoena the attendance of witnesses and the production of pertinent books, papers, and documents before a hearing committee after formal disciplinary proceedings are instituted." Thus, Respondent had the same opportunity to call the complaining witness as did Bar Counsel. Thus, to the extent that Respondent did not have an opportunity to cross-examine the complaining witness, it was because of Respondent's own failure to call him. Respondent may not now shift the burden to Bar Counsel to have called the complaining witness. Especially when one considers that at the conclusion of the hearing held on January 3, 1985, the Chairman informed Respondent that he could move for leave to call witnesses but Respondent did not. (HC Tr., p. 74). Therefore, Bar Counsel submits that Respondent's argument is without merit.

Moreover, for the Hearing Committee or the Board to have drawn an adverse inference from Bar Counsel's failure to call the complaining witness, they would have had to believe that the complaining witness would both elucidate the transaction and that he was "peculiarly available" to the non-producing party. *Garris v. United States*, 465 A.2d 817, 822 (D.C. 1983). Here, there was no showing that the complaining witness was unavailable to Respondent and Bar Counsel had no reason to believe that the complaining witness would elucidate the transaction.

It should be noted that Bar Counsel has the burden of proof in a disciplinary proceeding. *See* Board Rule 10.4. As the Board noted, Bar Counsel also has the discretion to prove his case in any manner that he chooses. In this case, Respondent did not contest the authenticity of the Bar Exhibits. Therefore, Bar Counsel chose to meet his burden through the introduction of documentary evidence. The Board found that the documentary evidence was substantial evidence of record that Respondent had neglected a legal matter entrusted to him and had misappropriated client funds. Therefore, under the Court's standard of judicial review the Board's findings should be accepted by the Court. D.C. App. Rule XI, § 7(3); *See also In re Smith*, 403 A.2d 296 (D.C. 1979).

With regard to the charge of neglect, the evidence showed that Respondent was given a power of attorney by IGR to handle a loan transaction in which he was required to secure a $1,105,000 debt on IGR's behalf and that he did not do it. For close to a year and one-half, Respondent left a $1,105,000 loan unsecured and unprotected. The evidence also demonstrated that the borrower, Darwish was able to borrow more money from another lender against the land in question because Respondent failed to file the deed securing the loan. (BE 18).

The evidence further showed that during the year and one-half period, IGR consistently confronted Respondent about executing the necessary documents to secure the loan. Moreover, the escrow agent also confronted Respondent about executing the necessary documents. However, Respondent still did not execute the quitclaim deeds nor did he deliver them to the escrow agent as he was required. In fact, it was only after Respondent had been replaced as IGR's counsel that the quitclaim deeds were executed and delivered to the escrow agent.

With regard to the charge that Respondent misappropriated client funds, Respondent's monthly bank

statements and checks[2] from the David M. Franklin & Associates trust account demonstrate that Respondent's running balance fell below the amount that he owed IGR immediately upon depositing IGR's funds into this trust account.[3] Specifically, on June 9, 1982, Respondent owed IGR $21,282 but his running balance was only $20,681.38. Subsequently, Respondent continued to misappropriate IGR's funds out of the trust account so that by July 12, 1982, the funds in the account had dropped to $11.60 (at a time when Respondent still owed IGR $21,282).

The checks and bank statements from Respondent's trust account also show that Respondent knowingly used IGR's money as his own for a period of seven months. Specifically, the checks and bank statements show that Respondent spent IGR's money to finance recording sessions, to pay his Carte Blanche bills, to pay METRO Music, and for his personal use.

II. The Normal Sanction For Misappropriation of Client Funds, Absent Extenuating Circumstances, Is Disbarment

The Court must adopt the recommended sanction of the Hearing Committee "unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or otherwise would be unwarranted." District of

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[2] In *Attorney Grievance Commission v. Boehm*, 446 A.2d 52, 54 (MD 1982), the Maryland Court of Appeals stated that it:

> ... cannot conceive of any clear or more convincing evidence of [attorney's] misappropriation of . . . funds than that supplied by the escrow account, bank records, and [the attorney's] failure to explain exactly how these funds were used.

[3] In *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983) the D.C. Court of Appeals stated that once the running balance in an attorney's trust account falls below what he owes his client misappropriation has occurred.

Columbia Bar Rule XI, Section 7(3). In the District of Columbia, the normal sanction for misappropriation of funds, absent extenuating circumstances, is disbarment. *In re Quimby*, 359 F.2d 257 (D.C. 1966); *In re Burton, supra; In re Mininberg*, 484 A.2d 149 (D.C. 1984). In *In re Hines*, 482 A.2d 378 (D.C. 1979) and *In re Harrison, supra*, the Court found extenuating circumstances where the misappropriation was inadvertent (e.g., due to sloppy bookkeeping practices rather than an intention to convert client funds). Thus, the Court held in those cases that a lesser sanction than disbarment was appropriate. In this case, however, the Board found no extenuating circumstances which would justify a sanction less than disbarment. (Bd. Rpt. at 12).

Moreover, Respondent not only misappropriated client funds, but neglected a client by leaving a $1,105,000 loan unsecured for approximately a year and one-half. In cases where the Court has found misappropriation, coupled with other violations of the Disciplinary Rules, the Court has not hesitated to disbar the attorney. *In re Mininberg, supra.* Thus, the Board's recommendation for disbarment falls well withing the range of sanctions imposed for comparable misconduct and should be upheld by the Board.

CONCLUSION

For the foregoing reasons, the Court should affirm the Report of the Board and should order that Respondent be disbarred.

Respectfully submitted,

/S/

Thomas H. Henderson, Jr.
Bar Counsel

/S/

Samuel McClendon
Assistant Bar Counsel
for Special Litigation

Office of Bar Counsel
515 - 5th Street, N.W.
Building A, Room 127
Washington, D.C. 20001
Telephone: 638-1501

APPENDIX G

FILED APR 30, 1986
/S/ Clerk

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 84-462

IN THE MATTER OF **DAVID M. FRANKLIN,**
RESPONDENT.

A Member of the Bar of the
District of Columbia Court of Appeals

On Review of a Report and Recommendation
of the Board on Professional Responsibility

(Submitted April 15, 1986 Decided April 30, 1986)

BEFORE: Pryor, Chief Judge, Nebeker, Associate Judge, and Pair, Senior Judge.

ORDER

In this disciplinary case, respondent is charged with neglecting a legal matter, dishonesty, and misappropriation of client funds. The Board on Professional Responsibility has recommended that the respondent be disbarred from the practice of law. We conclude that respondent has violated Disciplinary Rules DR 9-103(A) (failure to preserve identity of funds of a client), DR 6-101(A)(3) (neglect of a legal matter), and DR 1-102(A)(4) (conduct involving dishonesty). We therefore agree with the Board's recommendation of disbarment, as set forth more fully in the Board's Report and Recommendation appended hereto and incorporated herein by reference.

Accordingly, it is ORDERED that respondent, DAVID M. FRANKLIN, is disbarred from the practice of law in the District of Columbia effective thirty (30) days from the date of this order. D.C. Bar R. XI § 19(3). *See In re Burton,* 472 A.2d 831 (D.C.), *cert. denied,* 105 S.Ct. 563 (1984); *In re Minninberg,* 485 A.2d 149 (D.C. 1984); *In re Burka,* 423 A.2d 181 (D.C. 1980) (en banc).

PER CURIAM
/S/ DEPUTY CLERK

APPENDIX H

DISTRICT OF COLUMBIA COURT OF APPEALS

In the Matter of :
David M. Franklin
Respondent
: No. 84-462

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING LATE

Comes now the Respondent, David M. Franklin by and through his attorney, James W. Cobb represents to this Honorable Court, as follows:

1. That Respondent and his counsel were unable to communicate with each other after the April 30, 1986 order by the Court because the Respondent was away from his place of residence, which is the state of Georgia and although a member of the Bar of the District of Columbia does not practice law in this jurisdiction.

2. In this case there were no oral arguments in regard to the factual evidence presented nor were there oral arguments in regard to the constitutional issues raised by the Respondent.

3. The Court did not write an opinion on the issues raised by the Respondent, i.e., he had been denied procedural and substantive due process.

4. The order issued by the Court would be more meaningful and instructive in future litigations if the Honorable Judges of the Court addressed the constitutional issues raised by the Respondent.

WHEREFORE, the Respondent respectfully request leave of Court to file its Petition for Rehearing late in that it would appear that justice would best be served if the constitutional issues raised were addressed by this Court.

Respectfully submitted,

/S/ James W. Cobb (2253)
Attorney for Respondent

1004 6th Street, N.W.
Washington, D.C. 20001

APPENDIX I

DISTRICT OF COLUMBIA COURT OF APPEALS

In the Matter of :
David M. Franklin
Respondent

: No. 84-462

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING EN BANC LATE

Comes now the Respondent, David M. Franklin by and through his attorney, James W. Cobb, represents to this Honorable Court, the following:

1. That Respondent and his counsel were unable to communicate with each other after the April 30, 1986 order by the Court because the Respondent was away from his place of residence, which is the state of Georgia, and although a member of the Bar of the District of Columbia has never practice law in this jurisdiction.

2. The Court did not write an opinion on the issues raised by the Respondent in that he had been denied procedural and substantive due process.

3. The order issued by the Court would be more meaningful and instructive in future litigation only if the Honorable Judges of the Court had addressed the constitutional issues raised by the Respondent and not the Hearing Committee members.

4. Inasmuch as the proceedings involves a question of exceptional importance, constitutional rights, it would appear that a rehearing by the full Court is warranted.

WHEREFORE, the Respondent respectfully requests leave of Court to file his Petition for Rehearing En Banc late.

Respectfully submitted,
/S/ James W. Cobb (2253)
Attorney for Respondent

1004 6th Street, N.W.
Washington, D.C. 20001
Telephone: 387-1100

APPENDIX J

DISTRICT OF COLUMBIA
COURT OF APPEALS

In the Matter of	:	
	:	
David M. Franklin	:	
	:	Docket No. 84-462
A Member of the Bar of the	:	
District of Columbia	:	
Court of Appeals	:	

OPPOSITION TO PETITION FOR REHEARING AND TO PETITION FOR REHEARING EN BANC

On April 30, 1986, a panel of this Court agreed with the recommendation of the Board on Professional Responsibility that Respondent be disbarred from the practice of law for misappropriation of client funds in violation of Disciplinary Rules 9-103(A) (failure to preserve identity of client funds) and 1-102(A)(4) (conduct involving dishonesty); and neglecting a legal matter entrusted to him in violation of Disciplinary Rule 6-101(A)(3) (neglect of a legal matter).

ARGUMENT I
Respondent was not Denied Procedural or Substantive Due Process

Respondent argues that he was denied his Sixth Amendment right of confrontation because the complainant (his client) was not called by Bar Counsel as a witness at the evidentiary hearing. As Respondent argued in his Petition for Rehearing he "has not been allowed the opportunity to cross-examine the petitioner's missing witnesses based upon the issues." (Petition for Rehearing, page 1, para 3.) Under Rule XI, Section 13(1), of the Rules Governing the District of Columbia Bar, "A Respondent may, subject to Superior Court Civil Rule 45, compel by subpoena the attendance of witnesses and the production of pertinent

books, papers, and documents before a hearing committee after formal disciplinary proceedings are instituted." Thus, Respondent had the same opportunity to call the complaining the deed securing the loan. (BE 18). These facts, supported by substantial evidence of record, were undisputed by Respondent below.

The evidence further showed that during the year and one-half period, IGR consistently confronted Respondent about executing the necessary documents to secure the loan. Moreover, the escrow agent also confronted Respondent about executing the necessary documents. However, Respondent still did not execute the quitclaim deeds nor did he deliver them to the escrow agent as he was required. In fact, it was only after Respondent had been replaced as IGR's counsel that the quitclaim deeds were executed and delivered to the escrow agent.

With regard to the charge that Respondent misappropriated client funds, Respondent's monthly bank statement and checks[2] from the David M. Franklin & Associates trust account demonstrate that Respondent's running balance fell below the amount that he owed his client immediately upon depositing the client's funds into this trust account.[3] Specifically, on June 9, 1982, Respondent owed IGR $21,282 but his running balance was only $20,681.38. Subsequently, Respondent continued to misappropriate his

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[2] In *Attorney Grievance Commission v. Boehm*, 466 A.2d 52, 54 (MD 1982), the Maryland Court of Appeals stated that it:

> . . . cannot conceive of any clear or more convincing evidence of [attorney's] misappropriation of . . . funds than that supplied by the escrow account, bank records, and [the attorney's] failure to explain exactly how these funds were used.

[3] In *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983) the D.C. Court of Appeals stated that once the running balance in an attorney's trust account falls below what he owes his client misappropriation has occurred.

client's funds out of the trust account so that by July 12, 1982, the funds in the account had dropped to $11.60 at a time when Respondent still owed his client $21,282.

The checks and bank statements from Respondent's trust account also show that Respondent knowingly used IGR's money as his own for a period of seven months. Specifically, the checks and bank statements show that Respondent spent IGR's money to finance recording sessions, to pay his Carte Blanche bills, to pay METRO Music, and for his personal use.

ARGUMENT III

The Normal Sanction for Misappropriation of Client Funds, Absent Extenuating Circumstances, is Disbarment

The Court must adopt the recommended sanction of the Hearing Committee "unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or otherwise would be unwarranted." District of Columbia Bar Rule XI, Section 7(3). In the District of Columbia, the normal sanction for misappropriation of funds, absent extenuating circumstances,is disbarment. *In re Quimby*, 359 F.2d 257 (D.C. 1966); *In re Burton, supra; In re Mininberg*, 484 A.2d 149 (D.C. 1984). In *In re Hines*, 482 A.2d 378 (D.C. 1979) and *In re Harrison, supra*, the Court found extenuating circumstances where the misappropriation was inadvertent (e.g., due to sloppy bookkeeping practices rather than an intention to convert client funds). Thus, the Court held in those cases that a lesser sanction than disbarment was appropriate. In this case, however, the Board found no extenuating circumstances which would justify a sanction less than disbarment. (Bd. Rpt. at 12).

Moreover, Respondent not only misappropriated client funds, but neglected a client by leaving a $1,105,000 loan unsecured for approximately a year and one-half. In cases where the Court has found misappropriation, coupled with

other violations of the Disciplinary Rules, the Court has not hesitated to disbar the attorney. *In re Mininberg, supra.* Thus, the panel's recommendation for disbarment falls well within the range of sanctions imposed for comparable misconduct.

CONCLUSION

For the above reasons, the Office of Bar Counsel respectfully requests that the petition for Rehearing and for Rehearing *En Banc* filed by Respondent be denied.

Respectfully submitted,

/S/

Thomas H. Henderson, Jr.
Bar Counsel

/S/

Samuel McClendon
Assistant Bar Counsel
for Special Litigation
515 Fifth Street
Building A, Room 127
Washington, D.C. 20001
202-638-1501

DISTRICT OF COLUMBIA
COURT OF APPEALS
REC'D AUG 25, 1986
/S/
Clerk

APPENDIX K

DISTRICT OF COLUMBIA COURT OF APPEALS

In the Matter of	:	
	:	
David M. Franklin	:	
	:	Docket No. 84-84-462
A Member of the Bar of the	:	
District of Columbia	:	85-1643
Court of Appeals	:	

SUPPLEMENTAL MEMORANDUM

Comes now the Respondent, David M. Franklin, by and through his attorney, James W. Cobb, and by way of a Supplemental Memorandum in support of his Petition for Rehearing and Other Relief, and represents to this Honorable Court as follows:

ARGUMENT I

PETITIONER (RESPONDENT) HAS BEEN DENIED BOTH PROCEDURAL AND SUBSTANTIVE DUE PROCESS OF LAW

The District of Columbia Code Section 1-1509(b) states: "In contested cases, except as may otherwise be provided by law . . . the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received . . . [e]very party shall have the right to present in

person or by counsel his case, or defense by oral and documentary evidence, . . . and to conduct such cross-examination as may be required for a *full and true* disclosure of the facts."

Here the key words are "full and true" disclosure of the facts. The Court has not been exposed to the full and true facts because petitioner has not been given the opportunity to cross-examine the complaining witness, thus leaving left unexplained crucial facts. The complaining witness has only submitted an affidavit which respondent has denied. Thus raising issues of fact which procedurally entitles respondent to cross-examine the complaining witness. District of Columbia Bar Rule XI, Section 7(2). "If there are any issues of fact raised by the pleadings . . . [t]he notice of hearing shall advise the respondent that he is entitled to be represented by Counsel, to cross-examine witnesses, and to present evidence in his own behalf. . . ." Here, Bar Counsel did not comport with the rule because the complaining witness, with whom the issue of facts were raised never appeared and it was Bar Counsel's obligation to bring in the witness or to have the testimony taken, since Bar Counsel was the proponent of the rule. D.C. Code section 1-1509(b) and section 14-104. Respondent should not have the burden of bringing in the out-of-country complaining witness when the affidavit submitted by respondent clearly established and refuted issues pertaining to the facts.

In *Matter of Williams,* 464 A.2d 115 (D.C. App. 1983), a matter before the Board on Professional Responsibility, the Court of Appeals held that the finding of disciplinary violations and recommendation of disbarment which was not based on proof under oath, and failure to provide evidentiary hearing denied due process. In that case, Respondent claimed that among other rights, his due process rights were violated because the hearing committee did not hold a hearing on any of the charges against him. The Court of Appeals agreed. They said "[i]t is well settled that disciplinary proceedings are quasi-criminal in nature

and that an attorney who is the subject of such proceedings is entitled to procedural due process safeguards." Id. at 118-119. *See also, In re Ruffalo,* 390 U.S. 544, 550 (1968); *In re Thorup,* 432 A.2d 1221, 1225 (D.C. 1981); *In re Burka,* 423 A.2d 181, 185 (D.C. 1980) (en banc); *In re Colson,* 412 A.2d 1160, 1164 (D.C. 1979) (en banc); and *In re Wild,* 361 A.2d 182, 184 (D.C. 1976). The Court proceeded to state that "[t]he procedural requirements which apply in attorney disciplinary proceedings are analogous to those of other 'contested cases'." *Id. Also citing, In re Thorup, supra,* at 1225; the Court said "[t]he burden of providing the charges rests with Bar Counsel and factual findings must be supported by *clear and convincing* evidence."

In the *Matter of James,* 542 A.2d 163, 169 (D.C. App. 1982), the question was raised of "timely issues". The issue of respondent not being able to cross-examine the complaining witness was brought before the Board on Professional Responsibility. Bar Counsel asserted it was the respondent's responsibility to call the complaining witness, although the rules clearly state that Bar Counsel is the proponent of the rule and therefore it was their responsibility to have the complaining witness testify. D.C. Code section 1-1509(b).

ARGUMENT II

THE FINDINGS OF FACT AS PRESENTED BY THE BOARD ON PROFESSIONAL RESPONSIBILITY WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Bar Counsel must substantially prove its case, and the evidence they have relied upon had been contradicted by respondent. In order for the Court of Appeals to have *all* the facts necessary to achieve an honest and fair result, it has to rely on the Board on Professional Responsibility to establish the facts. In the case of *In re Hutchinson,* 474 A.2d 842, 843 (D.C. App. 1984), a disciplinary action, the Court stated that "[t]his Court is not equipped to engage in fact

finding. The function in disciplinary proceedings rests with the Board on Professional Responsibility whose findings of fact we must accept *if* they are supported by substantial evidence." (underscoring supplied) *Citing, In re Dwyer,* 399 A.2d 1 (D.C. 1979). In *Dwyer, supra,* the complaining witness did not testify; however, the wife of the complaining witness did testify, along with three other witnesses, to support the complaint of Bar Counsel. *Id.* at 5. The Board's findings appeared to turn on a question of credibility. The Hearing Committee stated that the "observation of the witnesses on the stand entered into its considerations . . . the demeanor of the witnesses. . . ." *Id.* at 6. However, in that case, respondent felt that the contradicted testimony of the complaining witness's wife "fell far short of the kind of convincing proof essential to an order of suspension or disbarment." *Id.* Bar Counsel took the position that because "the hearing committee heard the testimony and observed the demeanor of the witnesses its resolutions of credibility should be accepted." *Id.* The Court observed that the crucial findings turned upon "questions of credibility and . . . the demeanor of the witnesses. . . ." *Id.* at 7. *See also, Matter of Thornton,* 421 A.2d 1, 2 (D.C. App. 1980). In the *Matter of Thornton, supra,* a case before the Court of Appeals involving conflict of interest, the Court said "the crux of the factual matter revolves around respondent's credibility. . . ." *Id.* at 2., and that the Hearing Committee "was in the best position to determine credibility because they had a chance to observe and question the witnesses."

In the case at bar, respondent has not had the opportunity to expose the complaining witness, nor any witness's demeanor to the Hearing Committee or the Board on Professional Responsibility. As stated above the crucial finding turns on credibility and demeanor and since neither the Hearing Committee nor the Board on Professional Responsibility has had an opportunity to observe the com-

plaining witness or any witness to support Bar Counsel's Complaint, the contradicted evidence cannot be considered to be substantial evidence to support the position of the Petitioner below.

/S/

James W. Cobb (2253)
Attorney for Petitioner
1004 6th Street, N.W.
Washington, D.C. 20001
387-1100

APPENDIX L

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 85-1643

In the Matter of
DAVID M. FRANKLIN
A Member of the Bar of the
District of Columbia
Court of Appeals

BEFORE: *Pryor, Chief Judge; *Nebeker, Mack, Newman, Ferren, Belson, Terry, Rogers and Steadman, Associate Judges, and *Pair, Senior Judge.

ORDER

On consideration of respondent's petition for rehearing or for rehearing en banc, the opposition of Bar Counsel thereto, and respondent's supplemental memorandum in support of said petition, it is

ORDERED by the *merits division that respondent's petition for rehearing is denied; and it appearing that no judge of this court has called for a vote thereon, it is

FURTHER ORDERED that respondent's petition for rehearing en banc is denied.

PER CURIAM.

DISTRICT OF COLUMBIA
COURT OF APPEALS
FILED SEP 3, 1986
/S/
Clerk